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6 **IN THE SUPREME COURT**  
7 **STATE OF ARIZONA**

8 IN THE MATTER OF:

Supreme Court No. R-10-0031

9 PETITION TO AMEND ER 8.4,  
10 RULE 42, ARIZONA RULES OF  
11 THE SUPREME COURT

**Concerned Citizen's Comment to  
Petition to Amend ER 8.4, Rule 42,  
Arizona Rules of the Supreme Court**

12 **OVERVIEW**

13 I write as a Concerned Citizen "outsider" in support of the seventy-two  
14 Concerned Attorneys' Comment of July 15, 2011.<sup>1</sup> As a Concerned Citizen who  
15 is an Evangelical Christian (i.e., a person with sincerely held spiritual beliefs), I  
16 am opposed to the State Bar's petition to, by force of law, force political  
17 correctness on officers of the court. Political correctness is antithetical to the  
18 American Way and can only harm American society in the long run.

19 While, as an outsider, your Ethics Rules do not affect me directly, they  
20 affect me and all residents of Arizona indirectly. I write to explain the effects the  
21 Bar's petition and policies will have on individuals seeking to hire attorneys.  
22 While it appears well meaning on the surface, ironically, the Bar's petition and  
23 policies can only harm attorneys and their clients in the long run.

24 I will not focus on the legalities of the Bar's petition. Good legal arguments  
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<sup>1</sup> Seventy-two total as of Mr. McCaleb's July 20, 2011 addendum.

1 have already been made by the Concerned Attorneys. Besides, as I have found  
2 from personal experience in this forum, this not being a Court of law, the Court  
3 may not be bound by law here. So instead, I will add color to black letter law by  
4 briefly waxing philosophical, since this is really a political policy decision.

5 After a mandatory Notice, I will correct the record in the original petition.  
6 Then I will get to my points, concluding with a "radical" solution for the  
7 overarching problem of how to eliminate bias without enforcing politically  
8 correct speech on officers of the court.

### 9 **NOTICE**

10 As an aside, it may be that my Comment cannot be heard by the Justices at  
11 this time. For it may be that the Justices must recuse themselves from considering  
12 my input, since I, as a pro se, am currently suing all the Justices of the Arizona  
13 Supreme Court in federal court in their official capacities for a constitutional  
14 deprivation that goes back to this very Rule forum.<sup>2</sup> Therefore, "The judge[s  
15 have] a personal bias or prejudice concerning a party or a party's lawyer [i.e., me]  
16 . . . ".<sup>3</sup> I leave it for the Justices to make the determination whether they are  
17 legally allowed to consider the rest of this Comment. (Especially since by law, as  
18 it stands now, no one else can make that determination.)

19 Even if the Justices are not permitted to consider my Comment, I request  
20 this Comment be posted in the public forum so that others may consider it, echo  
21 it, amplify it or criticize it in the spirit of the forum.

### 22 **CORRECTING THE RECORD**

23 In addition to the errors in Mr. Furlong's petition cited by the Concerned  
24 Attorneys, mischaracterizing the ethical rules of other States (as aptly

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25 <sup>2</sup> *Palmer v. Jones, et al.*, 11-CV-1896 in the District Court of Arizona.

26 <sup>3</sup> Quoting Rule 2.11 Code of Judicial Conduct

1 documented in their Comment, page 12, line 24 and continuing), Mr. Furlong  
2 also erred by quoting an obsolete version of the Arizona Code of Judicial  
3 Conduct.

4 The Code he cited, with its obsolete Canons, had been replaced on  
5 September 1, 2009. (Mr. Furlong's petition is dated June 15, 2010.)

6 So, since Mr. Furlong said the quotes are foundational to his petition,<sup>4</sup> so  
7 as to set the record straight, I have taken the liberty of duplicating Mr. Furlong's  
8 original text in strikeout, followed by the corresponding updated version. From  
9 the 2009 Arizona Code of Judicial Conduct:

10 ~~Canon 3(B)(5) ("A judge shall not, in the performance of judicial duties,~~  
11 ~~by words or conduct manifest bias or prejudice, including but not limited~~  
12 ~~to bias or prejudice based upon race, sex, religion, national origin,~~  
13 ~~disability, age, sexual orientation or socioeconomic status, and shall not~~  
14 ~~permit staff, court officials and others subject to the judge's direction and~~  
15 ~~control to do so")~~

16 Contrast with new Rule 2.3(B) ("A judge shall not, in the performance  
17 of judicial duties, by words or conduct manifest bias or prejudice, or  
18 engage in harassment, including but not limited to bias, prejudice, or  
19 harassment based upon race, sex, gender, religion, national origin,  
20 ethnicity, disability, age, sexual orientation, marital status,  
21 socioeconomic status, or political affiliation, and shall not permit court  
22 staff, court officials, or others subject to the judge's direction and control  
23 to do so." )

24 ~~Canon 3(B)(6) ("A judge shall require lawyers in proceedings~~  
25 ~~before the judge to refrain from manifesting, by words or conduct, bias~~  
26 ~~or prejudice based upon race, sex, religion, national origin, disability,~~  
~~age, sexual orientation or socioeconomic status, against parties,~~  
~~witnesses, counsel or others. This § 3B(6) does not preclude legitimate~~

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25 <sup>4</sup> "The ethical obligation proposed by this amendment already is  
26 embedded in multiple rules regulating the conduct of Arizona lawyers and  
judicial officers." Bar's petition, page2, line 7-9

1 ~~advocacy when race, sex, religion, national origin, disability age, sexual~~  
2 ~~orientation or socioeconomic status, or other similar factors, are issues~~  
3 ~~in the proceeding.")~~

4 Contrast with new Rule 2.3(C) ("A judge shall require lawyers in  
5 proceedings before the court to refrain from manifesting bias or  
6 prejudice, or engaging in harassment, based upon attributes including but  
7 not limited to race, sex, gender, religion, national origin, ethnicity,  
8 disability, age, sexual orientation, marital status, socioeconomic status,  
9 or political affiliation, against parties, witnesses, lawyers, or others.")

10 ~~Canon 4(A) ("A judge shall conduct all of the judge's extrajudicial~~  
11 ~~activities so that they do not:(1) cast reasonable doubt on the judge's~~  
12 ~~capacity to act impartially as a judge")~~

13 Contrast with new Rule 3.1. ("Extrajudicial Activities in General  
14 A judge may engage in extrajudicial activities, except as prohibited by  
15 law or this code.

16 However, when engaging in extrajudicial activities, a judge shall not:

- 17 (A) participate in activities that will interfere with the proper  
18 performance of the judge's judicial duties;  
19 (B) participate in activities that will lead to frequent disqualification of  
20 the judge;  
21 (C) participate in activities that would appear to a reasonable person to  
22 undermine the judge's independence, integrity, or impartiality or demean  
23 the judicial office;")

24 ~~see also, Canon 4, Commentary ("Expressions of bias or prejudiced by~~  
25 ~~a judge, even outside the judge's judicial activities, may cast reasonable~~  
26 ~~doubt on the judge's capacity to act impartially as a judge. Expressions~~  
~~which may do so include jokes or other remarks demeaning individuals~~  
~~on the basis of their race, sex, religion, national origin, disability, age,~~  
~~sexual orientation or socioeconomic status.~~

27 Contrast with new Rule 3.1, Comment 3. ("Discriminatory actions and  
28 expressions of bias or prejudice by a judge, even outside the judge's  
29 official or judicial actions, are likely to appear to a reasonable person to  
30 call into question the judge's integrity and impartiality. Examples include  
31 jokes or other remarks that demean individuals based upon their race,

1 sex, gender, religion, national origin, ethnicity, disability, age, sexual  
2 orientation, marital status, political affiliation, or socioeconomic status.  
3 For the same reason, a judge's extrajudicial activities must not be  
4 conducted in connection or affiliation with an organization that practices  
5 invidious discrimination. See Rule 3.6.")

#### 6 **ARBITRARY AND CAPRICIOUS**

7 Please note that the current Code of Conduct contains both the words "sex"  
8 and "gender" classifications. Which seems redundant. It turns out it's confusing,  
9 ripe for abuse.

10 I thought these two words meant exactly the same thing. Not anymore.  
11 According to the Internet, in our brave new politically correct world, "sex" means  
12 one thing, "gender" quite another. Apparently, they can be opposite now. Imagine  
13 the possibilities for claims of professional misconduct with this ambiguity. You  
14 can't win!

15 Interestingly, the State Bar's proposal does not list "sex"—a classification  
16 one is born with and cannot choose—in its proposed revision. Instead it lists only  
17 "gender," apparently replacing "sex."

18 But the Bar adds "gender identity." Can "gender" and "gender identity" be  
19 opposite? Apparently so, else why list both. Again, imagine the possibilities for  
20 abusive claims of misconduct here.

21 As already articulated by the Concerned Attorneys in their Comment (page  
22 12, lines 3-17), the Bar's "gender identity or expression" are both personal  
23 choices, subject to change and wildly subjective. Which means there can be no  
24 objective way of legally knowing someone's "gender identity." As with current  
25 efforts to redefine "marriage," redefining "gender" and "gender identity" has  
26 made these terms virtually meaningless, undefinable and, most important,  
unknowable. This is problematic by definition, as the Concerned Attorneys and  
the Maricopa County Attorney have already stated in their respective Comments.

## **RELIGIOUS (IN)TOLERANCE**

1           Ironically, as the Concerned Attorneys correctly observe throughout their  
2 Comment, the Bar's petition and policies ostensibly promoting "tolerance" is  
3 intolerant itself. "This [proposed provision] creates a direct clash between  
4 professional obligations and religious convictions." (Page 12, lines 15-16)

5           For example, some of us call "gender" choices "sin" simply because the  
6 Creator does. (As when a creature repudiates his God-given gender.) But inherent  
7 and implied in the Bar's petition is that all bias is evil and must be eradicated.  
8 Even religious based "bias" stated without malice. The Court should not accept  
9 the Bar's premise that all biases/beliefs are 'ungood.' Many of us are simply  
10 driven to speak the truth in love.

11           When you distill the Bar's petition down to its core, this is really a spiritual  
12 battle, where one side is trying to force its beliefs on another. In essence, the Bar  
13 is promulgating a religion . . . its religion, such as it is. (Or isn't.<sup>5</sup>) For, by way of  
14 its petition, the Bar is dictating what is right and what is wrong to others.

15           But not all of us bow to the god of the Bar. Nor should one have to bow to  
16 the god of the Bar as a condition for livelihood. Arizona is not Saudi Arabia.  
17 People of differing beliefs are allowed to work here. So then, will we follow  
18 Judeo-Christian law, Islamic Sharia law, or the Bar's?

19           While I would prefer to live under the Judeo-Christian law, when it comes  
20 to this Court deciding which is "right," in this instant matter, as the Concerned  
21 Attorneys offered, in our form of government, this is a decision for the  
22 Legislature (as representatives of the people) to decide. It is not for five  
23 unelected people here to decide for attorneys and their customers because the  
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25  
26           <sup>5</sup> From Lennon's song, *Imagine*, the religion of "no religion too," where there  
are no eternal consequences for one's choices.

decision ultimately affects society at large.

And, as it stands now, I am deeply concerned for my brothers and sisters in the Lord who happen to be attorneys. I image they are already under duress as a result of their existing oath to the Court. The Bar's proposed policy will only make this worse. Whether by design or not, the Bar's proposal primarily impinges on people of faith. As the Concerned Attorneys documented on page 10, line 26 and following, policies that punish people for their religions convictions can only "drive people of faith from [the] profession." From the perspective that this is a spiritual battle, this is a logical end game for the powers of this world. So in the end, as long as there are attorneys who are people of faith, the Bar's policies that are ostensibly meant to encourage diversity punish diversity!

### **YOU CAN WIN IF YOU DON'T PLAY**

The fact is, you cannot silence beliefs and/or bias by silencing people, by threatening their right to work based on what they say. The best you can do is to prevent them from articulating what they think or feel. Which doesn't really solve the problem. It just puts a happy face on it. And causes it to fester.

So, stepping back and re-evaluating, I argue it would be better to restore the free speech rights of attorneys and NOT have policies regulating bias at all! For by restricting free speech, as an unintended consequence, you prevent the consumer (i.e., clients) from being able to spot bias, making it virtually impossible for consumers to make informed decisions about hiring lawyers who will represent them best!

A hypothetical example to flesh this out. Suppose I had been born black. And suppose I consult with an attorney, who is a closet White Supremacist who believes dark skin is a curse from God?<sup>6</sup> No attorney is going to be as candid as

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<sup>6</sup> Which, by the way, God never says in the Bible.

1 the late Senator Byrd to represent his true feelings toward blacks.<sup>7</sup> He is not  
2 going to use the "N" word, even in private among friends, for fear of being  
3 disciplined and possibly losing his license.

4       So then, deep down, unknown to me, my attorney hates me. Under the  
5 current policy, how could I learn of his hatred? Under the current policy, I could  
6 not. Only after it's too late might I realize his heart was never in my case. (I.e., no  
7 zeal.) Worse (and we have to allow for this reality), perhaps he purposely took  
8 my case to jinx it? If I later discover he's a member of a White Supremacist  
9 movement, then he's really open to misconduct charges for not disclosing his  
10 association.

11       No, it would be better for all if, consistent with the First Amendment, he  
12 was allowed to openly advocate for White Supremacists groups on his website.  
13 Then I could know he's not the attorney for me. As could others, including  
14 whites.

15       Or, consider an actual case from my world: Because a prominent  
16 monolithic religion in Arizona is taught that I am paid by the devil (because, as a  
17 Christian Evangelist, I speak out about their church), whenever a case of mine  
18 touches on that church, I always ask potential attorneys if they're members of that  
19 church. As it stands now, they're reluctant to address the question, even though,  
20 so far, the answer has always been in the negative. How will this be better if  
21 attorneys are absolutely prevented from disclosing their true feelings toward me?

22       I could end up hiring an attorney who, deep down, hates my guts and prays  
23

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24       <sup>7</sup> Quoting the late Senator, "I shall never fight in the armed forces with a Negro  
25 by my side ... Rather I should die a thousand times, and see Old Glory trampled in the  
26 dirt never to rise again, than to see this beloved land of ours become degraded by race  
mongrels, a throwback to the blackest specimen from the wilds."



1 for my demise, who may be prevented by his temple oath from giving me zealous  
2 advocacy even though the Bar's policies require he take my case. Just because he  
3 never articulates his bias toward me doesn't mean it doesn't exist.

4       Given this, it would be better to NOT have these rules and let attorneys  
5 disclose their feelings freely. For example, as touched on by the Concerned  
6 Attorneys, it would be better to restore all attorneys' First Amendment rights to  
7 free expression and free exercise of religion. To allow a Christian attorney to  
8 fully disclose his spiritual belief to a potential client if he chooses. To tell a  
9 potential client who broadcasts up front he's homosexual that "I'm sorry, but  
10 because of what my Lord says in His word in Leviticus 18:22, I cannot honestly  
11 give you zealous representation in your fight to challenge The Defense of  
12 Marriage Act." This way, the homosexual client can find an attorney more  
13 willing to take up his fight and the Christian attorney does not have to  
14 compromise his principles. It's a "win-win" for everyone.<sup>8</sup> What's wrong with  
15 that?

### 16                   **WHERE'S THE "UN-DO" COMMAND?**

17       Unfortunately, as the Concerned Attorneys noted, the proverbial horse has  
18 already left the barn. Policies already in force have been forwarded as an  
19 ongoing, premeditated effort from the Bar to promote its religion.

20       I saw the handwriting on the wall in 2005 when the ABA offered its  
21 preliminary report on a proposed Code of Conduct. In that proposal is the  
22 seemingly benign clause "a judge's extrajudicial activities must not be conducted  
23 in connection or affiliation with an organization that practices invidious  
24 discrimination." This has been adopted in Arizona.

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26       <sup>8</sup> I trust the Christian attorney would not charge for the short consult in such a  
situation.

1       While I haven't heard of it being tried yet, according to this law then, a  
2 judge cannot be active in the Boy Scouts of America, an organization most  
3 Americans believe is a worthy organization (and send their kids to). The issue is  
4 that the BSA "believes that homosexual conduct is inconsistent with the  
5 obligations in the Scout Oath and Scout Law to be morally straight and clean in  
6 thought, word, and deed." Clearly, by the current Code of Conduct, which  
7 invokes "sexual orientation," the BSA is arguably "an organization that practices  
8 invidious discrimination."<sup>9</sup> I'm surprised the challenge hasn't come up yet.

9       Therefore, while I applaud the Concerned Attorneys for taking a stand  
10 here, I encourage them to act on their own suggestion and, via this forum, move  
11 to reverse these extant policies, per their notice on page 3, lines 1- 6 of their  
12 Comment. It's past time to unwind the clock.

### 13                               **WHERE WILL IT END?**

14       Let's take the State Bar's policy to the extreme and see where it leads. As  
15 stated by Mr. Furlong, the Bar's policy is essentially to punish those who express  
16 "bias or prejudice against certain classifications of people who historically have  
17 faced discrimination."

18       Well, why stop at gender identity or expression? Why not make  
19 pedophiles, bestia-o-philis, etc. protected classes too? They currently face  
20 discrimination.

21       "These behaviors are currently illegal, and the Bar cannot condone  
22 illegality activity," you say? A mere technicality. Sodomy was illegal in Arizona  
23 until 2001. It's only a matter of time before these like behaviors are deemed legal

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24  
25       <sup>9</sup> In fact, the BSA's policy against homosexually was challenged by a  
26 homosexual scoutmaster, who lost at the Supreme Court in *Boy Scouts of America et al. v. Dale*, 530 U.S. 640 (2000) .

too. Once they are, there will be no end to what attorneys of faith will be forced to swallow to stay licensed.

There can be no middle ground following this path. You are either totally amoral and will have to leave the door wide open and "endorse" all sorts of aberrant behavior once it's deemed legal, or you will have to close the door at some point, citing a majority of the current Justice's current mores as justification. But then we would simply be inserting the Court's religion for the Bar's.

**THE END**

Which brings me back to my previous solution, invented by the Founders. We need not go there. Choking off one's First Amendment Rights is the wrong course. You cannot stop a valid sincerely held religious belief or an invalid cultural prejudice by stifling it. That only covers it up. Which makes it virtually impossible to see. That, in turn, harms consumers by depriving them of valuable information when it comes to choosing a lawyer.

Given the fact that personal beliefs, whatever their source, cannot be eradicated by edict, when it comes to the attorney/client relationship and public confidence in the judiciary, it would be better if attorneys were allowed to freely express their personal beliefs. This way, potential clients can better find an attorney who will better champion their cause. I trust that, over time, good ol' capitalism will weed out those attorneys whose beliefs are not condoned by society. Persuasion is better than force and attorneys will self-regulate if they want to stay in business. No need for draconian regulation, P.C. Police and micro-managing every aspect of an attorney's thoughts.

**Therefore**, for the reasons cited by the others in opposition as well as here, I urge the Court to reject the Bar's instant petition.

1 In the larger scheme, I urge the court to vacate the First Amendment  
2 restrictions currently imposed on officers of the Court, as such restrictions are  
3 detrimental to the profession and to society.

4  
5 Submitted this 27<sup>th</sup> day of October 2011.

6  
7 By 

8 Mike Palmer  
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12  
13 An electronic copy was emailed to:

14 John A. Furlong  
15 General Counsel  
16 State Bar of Arizona  
17 John.Furlong@staff.azbar.org

18 this same day.  
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